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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 206

EUGENE KOSTER, PETITIONER,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 17, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946

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EUGENE KOSTER, PETITIONER,

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(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE KOSTER, Appellant,

against

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Appellee, and James S. Kemper and James S. Kemper & Co., Inc., Defendants

STATEMENT UNDER RULE 13

The above entitled action was commenced on October 20, 1944, by filing the complaint in the office of the Clerk of the United States District Court for the Eastern District of New York. No order of arrest has been issued herein and no property of any defendant has been attached.

The appellee, (American) Lumbermens Mutual Casualty Company, moved to dismiss the complaint on the ground of *forum non conveniens*, and on other grounds.

An order granting said motion and dismissing the complaint was entered on February 7, 1945.

Notice of appeal was filed on April 27, 1945. The names of the original parties are above set forth and there has been no change of parties since the commencement of the action.

Appellant appears by Alfred Gurkin, Esq.

Appellee appears by Townley, Updike & Carter, Esqs.

Defendant James S. Kemper & Co., Inc., appears by Alexander & Ash, Esqs.

Defendant James S. Kemper has not been served and has not appeared in this action.

[fol. 2] IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action. File No. C-4322

EUGENE KOSTER, Plaintiff,

v.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, James S. Kemper, James S. Kemper & Co., Inc., Defendants

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Alfred Gurkin, Esq., plaintiff's attorney, whose address is 152 West 42nd St., N. Y. City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Percy G. B. Gilkes, Clerk of Court, by Nan V. McNabb, Deputy Clerk. (Seal of Court.)

Date: October 20, 1944.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

Plaintiff alleges on information and belief, except paragraph "1", subdivisions "(a)" and "(g)", and paragraph "2", which he alleges on knowledge:

As a first cause of action against defendants James S. Kemper and (American) Lumbermen's Mutual Casualty Company of Illinois

1. (a) Plaintiff is a citizen of the State of New York and a resident of its Eastern District.

(b) Defendant (American) Lumbermen's Mutual Casualty Company of Illinois ("Lumbermen's" here-

after), incorporated in 1912, was at all times since and now is a mutual insurance company organized under the laws of the State of Illinois.

(c) Defendant James S. Kemper ("Kemper" hereafter) is a citizen of the State of Illinois.

(d) Defendant James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), incorporated in 1927, was at all [fol. 4] times since and now is a corporation organized under the laws of the State of Illinois.

(e) The jurisdiction of the Court depends on diversity of citizenship.

(f) The amount in controversy, exclusive of interest and costs, exceeds $3,000.

(g) The action is not a collusive one to confer on a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

2. (a) Since May, 1941, plaintiff has been and he now is a member and policy holder of Lumbermen's.

(b) Plaintiff brings this action in the right of Lumbermen's and on behalf of all its members and policy holders.

3. The directors of Lumbermen's from 1925 to date and their times of tenure are listed in Schedule A annexed hereto.

4. (a) Since 1916 Kemper has been and he now is the President, Manager and Chairman of the Board of Directors of Lumbermen's.

(b) By reason of family relation, friendship and business association, the other directors and officers of Lumbermen's were at all times herein mentioned and still are dominated and controlled by Kemper in such manner that they were and are subservient to his wishes and directions without regard to the best interests of Lumbermen's.

(c) By reason of the premises Kemper did at all times herein mentioned and still does dominate and control the management, personnel and business policies of Lumbermen's.

[fol. 5] (d) The acts and omissions of Lumbermen's hereafter alleged were caused by Kemper.

5. Prior to 1942, the aggregate salary and other compensation paid by Lumbermen's to Kemper was less than $75,000 per year.

6. For the year 1942, Lumbermen's paid Kemper salary and other compensation aggregating $251,543.63, an increase of more than 235% over the preceding year.

7. Such salary and other compensation for 1942 were in excess of the reasonable value of Kemper's services because:

(a) The amounts paid to Kemper prior to 1942 were full and adequate compensation for his services; were so determined by the Board of Directors of Lumbermen's; and were so recognized and accepted by Kemper;

(b) The extent of Kemper's services in 1942 was not in excess of those in prior years;

(c) The gross earnings and net income of Lumbermen's in 1942 had increased by no more than 6.78% and 12.25%, respectively, over those in the preceding year;

(d) The 1942 salaries and other compensation of other managing executives holding positions comparable to those of Kemper in insurance companies similar to Lumbermen's were not substantially increased over those for the preceding year, except to the extent of reflecting promotions in individual cases;

(e) Kemper did not devote his full time and services to Lumbermen's, but occupied executive positions in several other insurance corporations and agencies.

[fol. 6] 8. To the extent that the 1942 payments by Lumbermen's to Kemper were in excess of Kemper's compensation for the preceding year, they were without consideration and constituted a gift of corporate assets.

9. The 1942 increase in Kemper's salary and other compensation was not revealed to the members and policy holders of Lumbermen's either in the notices of meeting or in the annual reports sent to them.

10. By reason of the premises Lumbermen's has sustained substantial damages.

11. Demand by plaintiff that the Board of Directors of Lumbermen's bring this action was not made, and would have been futile, because

(a) The members of the Board of Directors are dominated and controlled by Kemper;

(b) They have remained inactive although they have long had knowledge of the acts herein alleged;

(c) They participated in the wrongs herein alleged;

(d) They would not and could not have diligently prosecuted this action because, in effect, they would have had to bring it against themselves.

12. Plaintiff has no adequate remedy at law.

As a second cause of action against all defendants

13. Plaintiff realleges paragraphs "1"-"4" and "11".

14. (a) At all times since the organization of Kemper & Co., Kemper and family members, friends, associates, agents and employees of his held and still hold all or the majority of the capital stock of Kemper & Co.

[fol. 7] (b) By reason of the premises, Kemper did during all such times and still does dominate and control the management, personnel and business policies of Kemper & Co.

(c) During all such times Kemper and members of his family had and they still have the beneficial enjoyment of all or the major portion of the profits of Kemper & Co.

15. At all times since its organization Kemper & Co. has been engaged in business as an insurance agent.

16. (a) During all such times Lumbermen's employed Kemper & Co. as its agent for the transaction of insurance business in various parts of the United States.

(b) During all such times Lumbermen's paid substantial sums to Kemper & Co. as commissions, fees and otherwise.

17. (a) During all such times and since prior to 1927, Lumbermen's did and it still does maintain branch

offices staffed with its own employees throughout the United States; engage in extensive advertising campaigns; entertain numerous brokerage contacts; and solicit and write insurance without the intervention of a separate or independent agency.

(b) By reason of the premises Lumbermen's had and still has the organization, personnel, equipment, facilities and business connections to carry on its business and sell insurance without employing the services of Kemper & Co.

(c) Lumbermen's could have secured the same amount of business and could have conducted it with equal efficiency, without employing and paying for the purported services of Kemper & Co.

18. (a) The directors, officers, executives and certain employees of Kemper & Co. were at all times herein men-
[fol. 8] tioned and still are directors, officers, executives, or employees of Lumbermen's.

(b) At all times herein mentioned the office space used or occupied by Kemper & Co. throughout the United States was and still is part of the office space owned or rented by Lumbermen's.

(c) At all times herein mentioned Kemper & Co. did and it still does use the organization, personnel, assets and facilities of Lumbermen's in the conduct of its business.

19. (a) Kemper caused Lumbermen's to employ Kemper & Co. as its agent, as aforesaid.

(b) Kemper took such action not with a view to the best interests of Lumbermen's, but for the purpose of enriching himself, the members of his family, his friends and associates interested in Kemper & Co.

20. (a) Kemper and the other directors and officers of Lumbermen's concealed the facts herein alleged from the members and policy holders.

(b) The members and policy holders have remained ignorant of said facts, except that plaintiff discovered them in 1944, shortly before the commencement of this action.

21. (a) By reason of the premises Lumbermen's sustained substantial damage and the other defendants derived substantial profits.

(b) The precise amounts of such damage and profits being unknown to plaintiff, an accounting therefor by the defendants other than Lumbermen's is necessary.

22. Plaintiff has no adequate remedy at law.

[fol. 9] As a third cause of action against defendants Kemper and Lumbermen's

23. Plaintiff realleges paragraphs "1"-"4", "11" and "20".

24. (a) On or about January 29, 1926, Lumbermen's caused American Motorists Insurance Co. ("Motorists" hereafter) to be organized as a stock corporation under the laws of the State of Illinois.

(b) From its organization to date, Motorists has been and it is engaged in the insurance business.

(c) By reason of the sponsorship by Lumbermen's Motorists partook of the prestige, trade acceptance and goodwill enjoyed by Lumbermen's and had access to its business connections and brokerage contacts.

25. (a) From the organization of Motorists to December 30, 1927, Lumbermen's held 11,566⅔ shares of stock of Motorists out of a total of 11,666⅔ shares issued.

(b) From December 30, 1927 to December 31, 1943, Lumbermen's acquired an aggregate of 11,709⅔ shares and sold an aggregate of 15,035⅔ shares of Motorists.

26. (a) Lumbermen's received for the 15,035⅔ shares of stock of Motorists sold from December 30, 1927 to December 31, 1943, a total aggregate price of $916,163.62.

(b) The names of the purchasers, the dates of the sales, the numbers of shares sold, the price of each sale and the liquidating value per share at such dates are listed in Schedule "B" annexed hereto.

27. (a) The individuals to whom Lumbermen's sold the shares of Motorists, as aforesaid, were directors or officers [fol. 10] of Lumbermen's, family members, friends and business associates of theirs.

(b) The officers and directors of the corporations to which Lumbermen's sold stock of Motorists, as aforesaid, were also officers or directors of Lumbermen's or family

members, friends or associates of officers or directors of Lumbermen's.

(c) Kemper was an officer and director of each such corporation.

28. The prices at which Lumbermen's sold the shares of Motorists, as aforesaid, were inadequate because

(a) The aggregate liquidating value of said shares, at the respective times of the sale thereof, was $144,956.72 greater than the prices paid therefor;

(b) The aggregate true value of said shares, at the respective times of the sale thereof, was substantially greater than their liquidating value;

(c) Said shares were not publicly traded and had no established market value.

29. The facts alleged in paragraphs "23", "28" were known to Kemper and the other directors of Lumbermen's at the times said shares were sold, as aforesaid.

30. (a) Kemper caused the sale of said shares not with a view to the best interests of Lumbermen's, but for the purpose of enriching himself, his family members, friends and business associates.

(b) Kemper caused the sale of said shares pursuant to a conspiracy entered into from time to time between himself, the other directors of Lumbermen's and the purchasers of the shares.

[fol. 11] 31. In causing said shares to be sold, Kemper did not safeguard the interests of Lumbermen's with the care and diligence of a reasonably prudent business man.

32. (a) From 1930 through 1943, annual cash dividends aggregating $30.90 were paid on each share of Motorists.

(b) In 1943 a 33⅓% stock dividend was distributed on each share of Motorists.

(c) The aforesaid purchasers of stock of Motorists either retain such stock or have resold it at a profit; the exact dispositions are unknown to plaintiff and must be disclosed by an accounting.

(d) The present liquidating value of each share of Motorists, after giving effect to the stock dividend, is

$109.02; the true value of each such share is substantially greater.

33. By reason of the premises, Lumbermen's sustained damages in excess of $1,000,000 and the purchasers of said shares realized profits substantially in excess of such loss.

34. Plaintiff has no adequate remedy at law.

As a fourth cause of action against Kemper and Lumbermen's

35. Plaintiff realleges paragraphs "1"-"4", "14", "26" and "27", subdivisions (b) and (c).

36. Since prior to August 1, 1942, National Retailers' Mutual Insurance Company ("Retailers' Mutual" hereafter) has been and it now is a mutual insurance company incorporated under the laws of the State of New York.

[fol. 12] 37. (a) Prior to August 1, 1942 Retailers' Mutual issued and sold $375,000 principal amount of its Guarantee Fund Debentures.

(b) By the terms of each of said debentures Retailers' Mutual undertook to pay in perpetuity at least 5% interest annually upon the principal amount thereof.

(c) By the terms of each of said debentures, the principal amount thereof was and is not redeemable or callable by Retailers' Mutual, except upon the dissolution of Retailers' Mutual.

38. On or about August 1, 1942 Lumbermen's owned and held $225,000 principal amount of the Guarantee Fund Debentures of Retailers' Mutual.

39. (a) On or about August 1, 1942, and at various dates thereafter, Lumbermen's sold an aggregate of $112,050 principal amount of said debentures.

(b) Upon each such sale the purchase price was equal or substantially equal to the principal amount of the Guarantee Fund Debentures thus sold.

(c) The approximate dates of such sales, the names of the purchasers, the amounts of debentures sold, and the prices paid therefor are listed in Schedule C annexed hereto.

40. The individuals to whom Lumbermen's sold the Guarantee Fund Debentures of Retailers' Mutual, as afore-

said, were directors or officers of Lumbermen's; their family members, friends and business associates.

41. The prices at which Lumbermen's sold the Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were inadequate because:

[fol. 13] (a) Said debentures bore interest at the rate of 5% annually;

(b) Their security was equal to, or better than, the security of corporate bonds of the highest grade investment rating;

(c) Such security rested upon the facts, among others, that the net assets of Retailers' Mutual (substantially all of which were liquid) had and have a value of more than four times the total amount of said debentures outstanding; and that the annual net earnings of Retailers' Mutual were and are more than twelve times the amount of the annual interest payable on such debentures;

(d) Bonds or debentures of comparable security, bearing a similar rate of return and having analogous redemption and other features, were at the time of these sales traded at prices approximately equal to 200% of par;

(e) The fair and reasonable value of the aforesaid Guarantee Fund Debentures, at the time of each of said sales, was not less than 200% of par.

42. The facts alleged in paragraphs "36"-"41" were known to Kemper at the time said Guarantee Fund Debentures were sold, as aforesaid.

43. Kemper caused the sale of said Guarantee Fund Debentures not with a view to the best interests of Lumbermen's but for the purpose of enriching himself, his family members, friends and business associates.

44. In causing said Guarantee Fund Debentures to be sold, Kemper did not safeguard the interests of Lumber- [fol. 14] men's with the care and diligence of a reasonably prudent business man.

45. By reason of the premises, Lumbermen's sustained damages in excess of $112,050.

46. Plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands judgment:

1. Requiring the defendants named in each cause of action, except Lumbermen's, to account to Lumbermen's for the damages and profits alleged therein, with interest;

2. Awarding plaintiff the costs and expenses of this action, including reasonable counsel and accountants' fees; and

3. Granting plaintiff such other and further relief as may be just.

Alfred Gurkin, Attorney for Plaintiff, Office & P. O. Address, 152 West 42nd Street, Borough of Manhattan, City of New York.

(Verified October 19, 1944.)

[fol. 15] SCHEDULE "A"

Directors of Lumbermen's, 1925 Through 1943

Name	*Tenure* *From*	*Through*
H. W. Chandler	1925	1930
E. W. Dierssen	1925	1931
G. J. Farnsworth	1925	1940
E. E. Hooper	1925	1934
H. G. Kemper	1925	1943
J. S. Kemper	1925	1943
C. A. L. Rurmort	1925	1930
C. M. Rurmort	1931	1940
H. E. Stone	1932	1943
H. A. Wheeler	1936	1943
Mark Kemper	1936	1943
L. G. Rurmort	1941	1943
James D. Cunningham	1941	1943

SCHEDULE "B"

Sales by Lumbermens of Stock of Motorists

Names of Purchasers	Date of Sale	No. Shares Sold	Price Per Share	Total Proceeds of Sales	Liquidating Value Per Share	Excess of Liquidating Value Per Share Over Price Per Share	Total Excess of Liquidating Value Over Proceeds
Chandler, Farnsworth and Kemper	12/30/27	5,500	$53.47	$294,119.18	$53.52	$ .05	$14,705.95
H. G. Kemper	4/12/29	125	63.45	7,931.43	63.45		
Commercial Mutual Underwriting Corp.	12/30/31	8,496⅔	65.00	546,433.33	73.25	8.25	69,358.00
National Illinois Corporation	9/16/35	⅔	62.00	41.34	89.43	27.43	18.29
Mrs. Gertrude Z. Kemper	3/31/37	30	70.00	2,100.00	108.24	38.24	1,147.20
H. J. Giffing	3/31/37	5	70.00	350.00	108.24	38.24	191.20
R. H. Campbell	3/31/37	5	70.00	350.00	108.24	38.24	191.20
A. H. Stringe	3/31/37	35	70.00	2,450.00	108.24	38.24	1,338.40
Harry A. Wheeler	3/31/37	25	70.00	1,750.00	108.24	38.24	956.00
W. B. Morrell	3/31/37	15	70.00	1,050.00	108.24	38.24	573.60
H. W. Lunsche	4/7/37	7	70.00	490.00	108.24	38.24	267.68
J. C. Wilson	4/22/37	10	70.00	700.00	108.24	38.24	382.40
Frank J. Heitman	4/26/37	70	70.00	4,900.00	108.24	38.24	2,676.80
American Motorists Insurance Co.	4/28/37	2	30.00	60.00	108.24	78.24	156.48
National Retailers Mutual Insurance Co.	4/30/37	50	70.00	3,500.00	108.24	38.24	1,912.00
J. E. Magnus	4/19/39	25	69.00	1,725.00	116.80	47.80	956.00
R. J. Dunn	8/ 1/42	30	66.67	2,000.00	135.69	69.02	2,070.60
Chase M. Smith	8/ 1/42	75	66.67	5,000.00	135.69	69.02	5,176.50
Gertrude Z. Kemper	8/ 1/42	30	66.67	2,000.00	135.69	69.02	2,070.60
Charles E. Good	8/ 1/42	75	66.67	5,000.00	135.69	69.02	5,176.50
Norris C. Flanagin	8/ 1/42	115	66.67	7,666.67	135.69	69.02	7,937.30
Robert H. Campbell	8/ 1/42	30	66.67	2,000.00	135.69	69.02	2,070.60
Edward S. Beck (Dec'd)	8/ 1/42	70	66.67	4,666.67	135.69	69.02	4,831.40
Marie J. Rowe	8/ 1/42	38	66.67	2,533.33	135.69	69.02	2,622.76
Dwight S. Bobb	8/ 1/42	150	66.67	10,000.00	135.69	69.02	10,353.00
H. E. Stong	8/ 1/42	100	66.67	6,666.67	135.69	69.02	6,902.00
Central Mortgage Co.	1943	11⅓	60.00	680.00	140.67	80.67	914.26
Totals		15,035⅔		$916,163.62			$144,956.72

fol. 17] SCHEDULE "C"

Sales by Lumbermens of Guaranty Fund Debentures of Retailers Mutual

Date	Names of Purchasers	Par Value of Debentures Sold	Consideration Received
8/ 1/42	Charles M. Purmort	$10,000.00	$10,000.00
8/ 1/42	Charles E. Good	5,000.00	5,000.00
8/ 1/42	Norris C. Flanagin, City National Bank and Trust Co. and Hathaway G. Kemper, Trustees	2,500.00	2,500.00
8/ 1/42	No. T/A 22217	25,000.00	25,000.00
8/ 1/42	Robert H. Campbell	3,000.00	3,000.00
8/ 1/42	Edward S. Berk	5,500.00	5,500.00
8/ 1/42	Vance C. Smith, Jr.	1,000.00	1,000.00
8/ 1/42	H. G. Kemper	9,000.00	9,000.00
8/ 1/42	Harry E. Stone	3,500.00	3,500.00
8/ 1/42	James S. Kemper	4,000.00	4,000.00
8/ 1/42	James S. Kemper & Co.	20,000.00	20,000.00
8/ 1/42	Marjorie B. Haviland	1,200.00	1,200.00
8/ 1/42	Joan Stover	1,000.00	1,000.00
9/30/42	Mary S. Kemper	5,600.00	5,600.00
11/16/43	Central Mortgage Co.	5,750.00	5,865.00
1/20/43	Central Mortgage Co.	7,000.00	7,140.00
7/ 2/43	Central Mortgage Co.	3,000.00	3,060.00
	Totals	$112,050.00	$112,375.00

[fol. 18] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION

To Alfred Gurkin, Esq., 152 West 42nd Street, New York 18, N. Y.

SIR:

Please take notice that, upon the complaint herein, verified October 19, 1944; upon the annexed affidavit of T. H. Gillespie, sworn to December 23, 1944 and upon the annexed affidavit of Stuart N. Updike, sworn to December 26, 1944, the undersigned will apply to this Court at a Term thereof for motions in the United States Court House, Post Office Building, Washington Street, Borough of Brooklyn, City and State of New York on the 10th day of January, 1945, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard:

(1) For an order dismissing plaintiff's complaint herein, without prejudice, on the ground that this Court in its discretion should not entertain jurisdiction over an action requiring it to interfere with and

control the internal affairs of a foreign insurance corporation, to wit, defendant (American) Lumbermens Mutual Casualty Company; and

(2) For an order dismissing plaintiff's complaint, on the ground that an indispensable party defendant has not been served; and

[fol. 19] (3) For an order granting such other and different relief as to the Court seems proper.

Dated, New York, New York, December 27, 1944.

Townley, Updike & Carter, By Stuart N. Updike, Attorneys for Defendant (American) Lumbermens Mutual Casualty Company, Office and P. O. Address, 220 East 42nd Street, New York 17, N. Y.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF T. H. GILLESPIE IN SUPPORT OF MOTION

T. H. Gillespie, being duly sworn, deposes and says:

1. I am an officer, to wit, a Secretary, of Lumbermens Mutual Casualty Company, an Illinois corporation, having its principal place of business in the City of Chicago, Cook County, Illinois (licensed and doing business in the [fol. 20] State of New York under the name "(American) Lumbermens Mutual Casualty Company of Illinois" and sued herein as "(American) Lumbermens Mutual Casualty Company." Said defendant is hereinafter referred to as "Lumbermens."

2. This affidavit is made in support of an application by defendant Lumbermens to dismiss the complaint herein, without prejudice, on the ground that it would be an unwarranted and unlawful interference with the management and internal affairs of a foreign corporation for this Court to assume jurisdiction of the alleged causes of action set forth in the complaint. I am personally familiar, by reason of my official duties with Lumbermens, with the facts and information hereinafter set forth.

The Plaintiff

3. As appears from the complaint herein, plaintiff is a citizen of New York and a resident of the Eastern District. He alleges himself to have been a policy holder of defendant Lumbermens since the month of May, 1941. For the information of the Court, he has held policy number 8561182, which, in general, insures him as the owner of an automobile against loss on account of injuries to person and property of others. Since May, 1941, he has paid to Lumbermens by way of premiums a total of less than $250.

Defendant Lumbermens

4. Lumbermens was organized as a mutual insurance company under the laws of the State of Illinois in 1912. Its corporate existence has continued wtihout interruption since said date. It has been licensed to transact its business in New York State since 1927, and its regularly filed full annual reports have been matters of public record in [fol. 21] said State since said date. By its most recent report to the Director of Insurance of the State of Illinois, it had admitted assets of $32,941,954, liabilities (including voluntary reserves) of $44,941,954, and its aggregate net premiums from all sources in 1943 were $31,399,515.

5. Lumbermens is licensed by, and does business in, every one of the states of the United States, as well as the Dominion of Canada. It employs approximately 2,144 persons, located in well over half of the states of the United States. Of that number, approximately 750 are employed in the offices located in the City of Chicago, Illinois, where the head offices of Lumbermens have always been located since its organization.

6. The directors of Lumbermens are seven in number, five of whom are citizens and residents of the State of Illinois. The regular business addresses of all of said five are in the City of Chicago, Illinois, although not all of them reside within the corporate limits of said city. The two directors who are not residents of Illinois live, respectively, in Van Wert, Ohio, and in Lexington, Massachusetts. All of the officers of defendant Lumbermens are citizens and residents of Illinois, with the exception of those whose duties are limited to the underwriting and service phases of the respective branch offices to which they are as-

signed. Such officers attached to branch offices would have no personal knowledge and no substantial information concerning the controversies presented by the complaint herein.

7. All of the general records and all of the control records governing the business of Lumbermens as an entirety, are maintained in and physically present at its offices in Chicago, or in warehouses located in Chicago.

[fol. 22] 8. As noted above, Lumbermens is licensed to do business in New York under the supervision of the Superintendent of Insurance of said State. It has offices in several cities of said State, including New York City, Syracuse, Buffalo and others. None of its employees in said State has had any connection with the acts alleged as the subject matter of any of the four causes of action in plaintiff's complaint; and none of its records in New York State relate thereto, except in so far as annual reports of Lumbermens are filed with the Superintendent of Insurance in said State, and except in so far as the detailed records of sales and underwriting activities with regard to local business in New York State would be found there.

The Complaint

9. The complaint purports to state four causes of action. Disregarding the vague, uncertain, ambiguous and at times incomprehensible allegations of the complaint, a general statement of what appears to be the intendment of each cause of action is as follows:

First Cause

Defendant James S. Kemper (who, upon information and belief, has not been served in this action) received from Lumbermens an unwarranted increase in salary and other compensation for the year 1942;

Second Cause

Defendant James S. Kemper & Co., Inc., an Illinois corporation, received commissions, fees and other payments for services to Lumbermens, which Lumbermens could have rendered as efficiently for itself with its own employees;

[fol. 23] *Third Cause*

James S. Kemper caused Lumbermens, at various times, to sell stock of American Motorists Insurance Co., an Illinois corporation, to himself and others for sums substantially less than the true value of said stock; and

Fourth Cause

James S. Kemper caused Lumbermens to sell Guarantee Fund Debentures of National Retailers Mutual Insurance Company to himself and others for sums substantially less than the true value of said Debentures.

By reason of the nature of the instant application, it will be assumed, although of course not conceded, that the allegations of the complaint are meritorious.

On the Facts, This Court Should Decline Jurisdiction Without Prejudice, and Relegate Plaintiff to the Proper Jurisdiction

10. I respectfully submit that, on the facts stated above, and those hereinafter appearing, the conduct of this lawsuit will result in measurable monetary damage, and incalculable additional harm to Lumbermens if it remains in this forum. In the first place, it will be obvious that, were plaintiff entirely successful, the net effect of the recovery by Lumbermens upon plaintiff's interest in that Company would be negligible. The most such recovery could accomplish would be an increase in the dividends applicable to his policy. The entire aggregate of premiums paid by plaintiff since he has been a policyholder is less than $250, and he has received dividends at the rate of approximately 20 percent of the premiums on all completed policy years. In the second place, the measurable harm and monetary damage to Lumbermens, whether [fol. 24] plaintiff wins or loses, would accrue in the following respects:

(1) Vast quantities of records, dealing with compensation, agency fees, agency practice, brokerage relationships and commissions, and underwriting, in-

spection and claim expenses, and an infinite variety of insurance and management detail, over a long period of years will be demanded to be transported to the Eastern District of New York for examinations before trial or for the trial itself;

(2) The travelling expenses of officers, directors and employees of Lumbermens between Chicago and the Eastern District of New York, and their hotel expenses while there, would have to be met;

(3) The loss of time on the part of such officers, directors and employees while travelling, and their inability to attend to their normal duties for Lumbermens would cause direct monetary loss, as well as unmeasurable indirect damage;

(4) The travelling and other expenses of the Director of Insurance and various auditors and other employees of the Department of Insurance of Illinois, under whose supervision defendant Lumbermens has operated since its inception, would have to be met.

This Court can judicially notice the accessibility of such persons and such records to the Illinois courts, as contrasted with the difficulties which will be met in connection with their production in the Eastern District awaiting trial, or call to testify, possibly to rebut some contention that may be abandoned or not even made.

11. Plaintiff, by reason of the class character of the action, is in a position where the only proof personally to [fol. 25] come from him is the establishment of his status as a policyholder. There can be no substantial harm or hardship to him in relegating him to his remedy before either the Federal or the State courts in Illinois, the state where all of the acts and transactions complained of took place. The granting of the instant application would not in any way deprive him of his day in court.

12. I respectfully urge to the Court the following additional considerations bearing on its exercise of discretion on this application:

(1) the cost to plaintiff of bringing this action is negligible, whereas the damage, expense and inconvenience to this defendant would be huge;

(2) plaintiff is but one of over 400,000 policyholders of Lumbermens, including holders of workmens compensation, boiler, plate glass and general insurance, as well as fidelity and surety bonds;

(3) plaintiff has never written to Lumbermens' Board of Directors or attended the meetings, regularly scheduled and held in Chicago each year, of the policyholders of Lumbermens for any purpose, let alone to file any protest, written or otherwise, concerning the matters now alleged in the complaint;

(4) plaintiff does not claim to have presented any of the grievances alleged either to the Department of Insurance in Illinois or to the Department of Insurance in New York, although the statutes of both states contemplate the filing of such complaints or inquiries by policyholders of insurance companies;

(5) the books, records, acts and all business transactions of Lumbermens are subject, in the interests of all policyholders, to examination and audit by the insurance authorities of every state in which it does [fol. 26] business and have in fact been examined and audited customarily every three years by the Department of Insurance of Illinois, as well as by other state insurance departments; and

(6) such examinations and audits are exhaustive, taking during the last ten years, from three to five months to complete.

I urge this Court to consider that, in passing upon the internal management and affairs of Lumbermens, it will be asked to apply not only Illinois corporate law in general, but the statutory provisions of the Insurance Law of said State, as interpreted by court decisions, as well as by rulings on the part of the Director of Insurance. Moreover, the application thereof will be required to be made to the numerous types of insurance coverage mentioned above, with separate and generally different rates of agency and brokerage commission or compensation applicable thereto.

I therefore respectfully ask that, in the exercise of a sound discretion, and after weighing the absence of hardship to plaintiff against the obvious damage to Lumber-

mens, this Court deny jurisdiction, without prejudice to a renewal of any or all of plaintiff's claims in a forum where he can have his day in court without loss to himself but with a minimum of inconvenience, expense, damage and difficulty to Lumbermens, whose interest he professes to espouse in bringing this lawsuit.

(S.) T. H. Gillespie.

Sworn to before me this 23 day of December, 1944. (S.) Clifford A. Kiracofe. My Commission Expires April 17, 1948. (Seal.)

(Clerk's certificate attached.)

[fol. 27] In United States District Court

Affidavit of Stuart N. Updike in Support of Motion

Stuart N. Updike, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Townley, Updike & Carter, representing defendant (American) Lumbermens Mutual Casualty Company. This affidavit is made in support of a motion to dismiss plaintiff's complaint herein, without prejudice, upon the grounds

(1) that this Court in its discretion should not entertain jurisdiction over an action requiring it to interfere with and control the internal affairs of a foreign insurance corporation, to wit, defendant (American) Lumbermens Mutual Casualty Company; and

(2) that an indispensable party defendant has not been served.

As appears from the complaint herein, defendant James S. Kemper is included as a party defendant in each of the four causes of action therein alleged. In each cause of action, relief is sought against him and rights of his are sought to be adjudicated. On information and belief, defendant James S. Kemper has not been served with process in this action. On these facts, as appears from the accompanying memorandum of law, this Court will decline to take or retain jurisdiction, especially since there is a forum open to

[fol. 28] plaintiff where he can obtain jurisdiction over each of the defendants.

On information and belief, defendant James S. Kemper is now, and has been for more than thirty years, a citizen of the State of Illinois and resides in Winnetka, Illinois. I have no reason to believe that he will be in New York at any time in the next year or ten years.

As appears from the affidavit of T. H. Gillespie, sworn to December 23, 1944, submitted herewith, there are present in this action all of the factors which in the past have repeatedly induced courts to reject jurisdiction of controversies arising in a foreign state, involving the internal management and affairs of a foreign corporation. In addition to the difficulties presented in such cases as to corporations generally, the court would have the added burden of construing the Illinois Insurance Code and regulations issued thereunder by the Insurance Department of said state.

Moreover, no substantial prejudice to plaintiff is likely to arise by reason of the granting of the motion, since he is in no sense being deprived of his day in court. It is therefore respectfully prayed that an order be made dismissing the complaint herein without prejudice to a renewal of any or all of the alleged causes of action set forth in the complaint in such other forum as plaintiff may be advised.

Stuart N. Updike.

(Sworn to December 26, 1944.)

[fol. 29] In District Court of the United States

Affidavit of William E. Haudek in Opposition to Motion

William E. Haudek, being duly sworn, deposes and says:

I am an attorney associated with Abraham L. Pomerantz, counsel for the plaintiff in the above entitled action. I submit this affidavit in opposition to the motion of defendant (American) Lumbermens Mutual Casualty Company ("Lumbermens" hereafter) to dismiss the action.

This action was commenced by the filing of the complaint on October 20, 1944. The summons and complaint herein have been duly served upon Lumbermens and upon defendant James S. Kemper & Co., Inc. The individual defendant James S. Kemper has not yet been served.

I am informed and verily believe that Mr. Kemper, who is a resident of Illinois, was in New York at or about the time this action was commenced. My information is based on newspaper statements, upon statements of Mr. Kemper's secretary and upon statements of the Clerk or other attendant of the Hotel Roosevelt at which Mr. Kemper was staying at that time. Despite strenuous efforts the United States Marshal and a process server appointed by this Court were unable to make service upon Mr. Kemper. Plaintiff proposes to make such service upon Mr. Kemper's next visit to New York.

A memorandum of law submitted herewith sets forth the grounds for which I respectfully submit the motion to dismiss should be denied.

William E. Haudek.

(Sworn to January 9, 1945.)

[fol. 30] In United States District Court

Alfred Gurkin, Attorney for Plaintiff; Abraham L. Pomerantz and William E. Haudek, of Counsel.

Townley, Updike & Carter, Attorneys for (American) Lumbermens Mutual Casualty Company; Stuart N. Updike, of Counsel.

Opinion

Abruzzo, D. J.:

The plaintiff, a citizen of New York, residing in this District, sued the three defendants above named.

The Lumbermens Mutual Casualty Company is a mutual insurance company which was organized and exists under the laws of the state of Illinois.

James S. Kemper & Co., Inc., is a corporation organized under and by virtue of the laws of the State of Illinois; and James S. Kemper, the individual defendant, is a citizen and resident of Illinois.

The plaintiff alleges that since May, 1941, he has been and is now a member and policyholder of the Lumbermens Mutual Casualty Company and brings this action in the right and on behalf of all its members and policyholders.

The motion brought under Rules 12 (b) and 19 (a) of the Rules of Civil Procedure asserts (1) that this Court in its discretion should not entertain jurisdiction over an ac-

tion requiring it to interfere with and to control the internal affairs of a foreign insurance corporation; and (2) that plaintiff has failed to bring before the Court as a defendant, an indispensable party, to wit, James S. Kemper.

The first cause of action is against Lumbermens Mutual Casualty Company and the individual defendant, Kemper, and alleges that the defendant Kemper received from the Lumbermens Mutual Casualty Company an unwarranted increase in salary and other compensation which was without consideration and constituted a gift of corporate assets. [fol. 31] The second cause of action, against all three defendants, alleges that the individual defendant Kemper dominated and controlled the management, personnel and business policies of the defendant, James S. Kemper & Co., Inc.; and that the defendant, James S. Kemper & Co., Inc., received commissions, fees and other payments for services to the Lumbermen's Mutual Casualty Company which the Lumbermen's Mutual Casualty Company could have rendered just as efficiently for itself with its own employees; and seeks an accounting of all the profits derived by the James S. Kemper & Co., Inc., because of the action so complained of.

The third and fourth causes of action against the individual defendant Kemper and Lumbermens alleges that Kemper knowingly and wilfully caused Lumbermens at various times to sell shares of stock for a sum less than the true value of the security and, by reason of these sales, the Lumbermens sustained damages in excess of $1,112,050.

The complaint demands that Kemper and the Kemper corporation be required to account to the Lumbermens for all damages and profits alleged in the complaint; and that the plaintiff be awarded the costs and expenses of this action including counsel fees and accountant's fees.

James S. Kemper, a very necessary party, especially in the first cause of action, and in the third and fourth causes of action, has not been served and, unless he is found in this jurisdiction, never can be served. The first cause of action, therefore, will, unless service is effected, necessarily fall, as will the third and fourth causes of action. The second cause of action being against all three defendants can be tried but not against Kemper as an individual defendant. Under the first cause of action, the Lumbermens Mutual Casualty Company will receive no benefits unless a judg-

ment directs Kemper to account for his excess in compensation. The third and fourth causes of action would necessarily have to direct Kemper, the individual, to pay back [fol. 32] to Lumbermens a judgment up to and beyond the sum of $1,112,050. The second cause of action might possibly result in some benefit to the Lumbermens Mutual Casualty Company in the event it were tried.

Rule 12 (b) of the Rules of Civil Procedure permits defenses at the option of the pleader: (1) for lack of jurisdiction over the subject matter, (2) for lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, and (6) failure to state a claim upon which relief can be granted.

The affidavit of T. H. Gillespie, secretary of Lumbermens Mutual Casualty Company, in support of this motion makes the following allegations which I believe are pertinent to the issue involved:

Lumbermens does business in every one of the 48 states. It employs approximately 2,144 persons, 750 of whom are employed in the Chicago offices, the home and principal place of business of Lumbermens since its organization. All of the general records relating to the business of Lumbermens are maintained in Chicago or warehouses located closely thereby. Lumbermens has seven directors, five of whom are residents of the State of Illinois, having regular places of business in the City of Chicago. The other officers are residents of the State of Illinois. None of the records necessary for the trial of the issues of this action and none of the witnesses who apparently have any knowledge of the acts alleged in the complaint live outside the State of Illinois, and most of the witnesses and all of the records are in and about the City of Chicago.

There will be involved in the trial of this action the transportation of large quantities of records from Chicago to this District. There will also be involved the traveling expenses and subsistence of witnesses for examination before trial of directors, officers and employees of Lumbermens and the attendant loss of time of these witnesses [fol. 33] when they come to this District. If the defendant is successful, it would be most unjust to require the tremendous expense involved, and this is true should the plaintiff be successful.

It is important to note at this point that this plaintiff apparently never attended any meetings of the Lumber-

mens policyholders, wrote or spoke any criticism of the conduct or affairs of the company, or ever indicated he had any protest or complaint to make either to the Director of Insurance of Illinois or the Superintendent of Insurance of New York, or the Lumbermens Mutual Casualty Company.

Another item to be taken into consideration is the extreme emergency with respect to transportation and hotel accommodations which now exists and which will undoubtedly exist for some time to come.

The defendant contends that in the exercise of the Court's sound discretion it should decline jurisdiction and dismiss plaintiff's complaint without prejudice for renewal in the appropriate forum and, secondly, that the absence of an indispensable party defendant without whose presence the Court could render justice between the parties, preclude this Court from accepting jurisdiction.

The plaintiff does not deny he is a member and policyholder of Lumbermens. He contends that this is a derivative action brought by the plaintiff on behalf and for the benefit of the defendant, Lumbermens Mutual Casualty Company. He concedes under Point I of his brief that "It is elementary that the courts of one state * * * may in their discretion refuse to take jurisdiction of a suit involving the internal affairs of a foreign corporation." His contention is that this suit is not one involving the internal affairs of a foreign corporation but is a stockholder's derivative suit which seeks an accounting for corporate mismanagement and, as it does not involve the internal affairs of a foreign corporation, jurisdiction is mandatory. The plaintiff is not a stockholder—he is a policyholder.

[fol. 34] In support of this contention, plaintiff cites *Hirshhorn* v. *Mine Safety Appliances Co.*, 54 F. Supp. 588 (W. D. Pa.), which was an action for an accounting of profits from the use of patents. This case held that it was not an abusive discretion even if it involves the internal management of a foreign corporation, for a District Court to accept jurisdiction of such a case. In *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, the Supreme Court stated as follows (p. 131):

> Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal

> affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever consideration of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case.

Overfield v. *Pennroad Corporation*, 113 F. (2d) 6 (C. C. A. 3d), cited in support of plaintiff's contention is not in point for the reason that the plaintiff, who was a citizen and resident of the State of Utah, instituted suit in the Eastern District of Pennsylvania, basing federal jurisdiction upon diversity of citizenship. All of the individual defendants and directors of the defendant were citizens of Pennsylvania. The court properly accepted jurisdiction.

The *Rogers* case is authority for the settled doctrine that a court, state or federal, as a general rule will decline to interfere with the internal affairs of a corporation organized under the laws of another state, but will leave such controversies as to such matters to the courts of the state of domicile.

Our own Circuit Court of Appeals, on February 26, 1942, in the case of *Cohen* v. *American Window Glass Co.*, 126 F. [fol. 35] (2d) 111, reiterated the rule in the *Rogers* case and added (p. 114):

> • • • it seems proper to observe a definite trend away from decision of non-federal matters in federal courts except where jurisdiction is clear; • • •

It should be borne in mind too that there are regulatory statutes in Illinois and these statutes indicate that certain actions affecting the internal management of insurance companies organized under its laws must be maintained in the first instance by the Director of Insurance represented by the Attorney General. The decisions seem to indicate that upon a proper showing, if the Director of Insurance refuses to act, mandamus will lie to compel him to perform his statutory duty. *People ex rel. Benefit Association of Railway Employees* v. *Miner*, 56 N. E. (2d) 353 (Supreme Court, Illinois, 1944); *People ex rel. Barber* v. *Hargreaves*, 303 Ill. App. 387 (1940); *Micezey* v. *Missouri State Life Insurance Company*, 273 Ill. App. 281 (1934).

This may be of importance in view of the fact that the plaintiff has never communicated or made any complaint to the Insurance Department of the State of Illinois.

It is evident that the action involves the internal management of a foreign corporation, and it is apparent too that the consideration of convenience of witnesses and efficiency and justice demand that this Court refuse to entertain jurisdiction. The plaintiff and his lawyer it seems would be the only persons needed to prosecute this action in Illinois. Due to the number of witnesses that would necessarily have to be called by the defendant and the records introduced in evidence, all found in and around the City of Chicago, this supports the conclusion that the case should properly be tried in Illinois.

Kemper, the individual, is undoubtedly an indispensable party defendant and vitally necessary to support the alle-[fol. 36]gations in the complaint, especially the first cause of action, and the third and fourth causes of action. The defendant should not go to trial without that party having been served so as to be before the Court. *Shields* v. *Barrow*, 17 How. 130 (1855); *State of California* v. *Southern Pacific Co.*, 157 U. S. 229; *United States* v. *Washington Institute of Technology*, 138 F. (2d) 25 (C. C. A. 3d), referring to Rule 19 (a) of the Rules of Civil Procedure, stated. (p. 26):

> As described in the leading case upon the matter, they were persons who had such an interest that any final decree rendered had to affect that interest.

The opinion referred to the rule laid down in *Shields* v. *Barrow*, *supra*.

The Court could not justly render a judgment or a decree consistent with equity and good conscience unless Kemper was properly before this Court. This is especially true because Kemper is the sole defendant against whom relief is sought in the first, third and fourth causes of action, and his right, expressions, and duties are inseparable from those of James S. Kemper & Co., Inc., his co-defendant in the second cause of action.

There may be some justice to the contention of the defendant that as the action is only at issue for three months it is conceivable that Kemper might be served. On the other hand, if he were not served when the action came be-

fore the Court for trial and, if an order were not made by me, it is conceivable that the case would be pressed to trial without Kemper and the defendant thereby would lose the value of its rights. Under these circumstances, it would be perfectly proper for this Court to direct an order to be entered staying the trial of the second cause of action until Kemper was served. That direction does not seem to be necessary in view of my conclusion that the action [fol. 37] should be dismissed because the suit relates to the internal affairs of a foreign corporation and that the convenience of witnesses and efficiency and justice demand that the courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case.

Enter an order in accordance with this decision on notice.

M. T. Abruzzo, U. S. D. J.

In United States District Court, Eastern District of New York

Order Appealed From—Filed February 7, 1945

Defendant (American) Lumbermens Mutual Casualty Company having duly moved this Court for an order dismissing the complaint herein on the ground that this Court, in its discretion, should not entertain jurisdiction over an action requiring it to interfere with and control the internal affairs of a foreign insurance corporation, and on the further ground that an indispensable party defendant has not been served, and said motion having come on to be heard before this Court on the 10th day of January, 1945 and Townley, Updike & Carter, Esqs. (Stuart N. Updike of counsel) having appeared in support of said motion and Alfred Gurkin, Esq. (Abraham Pomerantz and William E. Haudek, Esqs. of counsel) having appeared in opposition thereto,

[fol. 38] On reading and filing the notice of motion dated December 27, 1944, the summons and complaint herein verified October 9, 1944, the affidavits of T. H. Gillespie sworn to December 23, 1944 and of Stuart N. Updike sworn to December 26, 1944 in support of said motion, and the affidavit of William E. Haudek sworn to January 9, 1945 in opposition thereto,

Now, upon motion of Townley, Updike & Carter, attorneys for defendant (American) Lumbermens Mutual Casualty Company, and the opinion of Judge M. T. Abruzzo, dated January 30, 1945, and due deliberation having been had, it is hereby

Ordered, that said motion to dismiss said complaint be and the same hereby is granted in all respects and the complaint be and the same hereby is dismissed without prejudice.

M. T. A., U. S. D. J.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Notice is hereby given that Eugene Koster, the Plaintiff herein, appeals to the United States Circuit Court of Appeals for the Second Circuit from the order and judgment herein, filed February 7, 1945, dismissing the complaint.

Dated: New York, April 24th, 1945.

Alfred Gurkin, Attorney for Plaintiff, Office & P. O. Address, 152 West 42nd Street, Borough of Manhattan, New York 18, N. Y.

[fol. 40] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the Record of the United States District Court for the Eastern District of New York in the above entitled matter, as agreed upon by the parties.

Dated, New York, August 29, 1945.

Alfred Gurkin, Attorney for Appellant; Townley, Updike & Carter, Attorneys for Appellee.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 86

(Argued November 8, 1945. Decided February 4, 1946)

Docket No. 19927

EUGENE KOSTER, Appellant,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Appellee,

and

JAMES S. KEMPER and JAMES S. KEMPER & CO., INC., Defendants

Before Swan, Chase and Clark, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Derivative action by a policy holder in a mutual insurance company to require one of its directors and another defendant to account to it for diverting assets. From a judgment dismissing the complaint without prejudice to suit in a different forum, the plaintiff appeals.

[fol. 43] Alfred Gurkin, Attorney for appellant; Abraham L. Pomerantz and William E. Haudek, of counsel.

Townley, Updike & Carter, Attorneys for appellee; Stuart N. Updike, of counsel.

SWAN, Circuit Judge:

This is a derivative action brought in the federal court on the ground of diverse citizenship. The plaintiff, a resident of the Eastern District of New York, is the holder of an automobile liability policy issued by (American) Lumbermens Mutual Casualty Company, a mutual insurance company organized under the laws of Illinois and licensed to do business in New York. For brevity the company will hereafter be called Lumbermens. The other

defendants are James S. Kemper, who resides in Illinois and is an officer and director of Lumbermens, and James S. Kemper & Co., an Illinois corporation controlled by Mr. Kemper. In the right of Lumbermens and on behalf of all its policy holders, the plaintiff's complaint charges Kemper and the Kemper company with diversion of Lumbermens' assets and asks that they account to it for profits and damages. There are four causes of action pleaded: the first charges that Kemper dominated Lumbermens and caused it pay him excessive salary for which he gave no consideration; the second charges that he caused Lumbermens to pay the Kemper company unwarranted commissions and fees; the third and fourth charge that he caused Lumbermens to sell to him and other persons allied with him various securities at less than their value. Lumbermens moved to dismiss the complaint on the ground of (1) forum non conveniens, and (2) absence of an indispensable party, James S. Kemper not having been served. The [fol. 44] motion was granted and the complaint was dismissed without prejudice. The plaintiff has appealed

Since James S. Kemper is the only defendant against whom relief is sought in counts one, three and four, it is obvious that the causes of action alleged in those counts cannot proceed to trial unless Mr. Kemper can be served within the jurisdiction of the court. But it would have been premature to dismiss the complaint for lack of service on him during the two months which intervened between the filing of the complaint and the Lumbermens' motion to dismiss.[1] Moreover Mr. Kemper was not an indispensable party to the cause of action asserted in count two against Kemper & Co. Its liability rests upon participation in the alleged wrongdoing of Kemper as a fiduciary of Lumbermens, and there is no reason why such liability cannot be tried without Kemper's presence as a party. Therefore dismissal could not properly be rested on the absence of an indispensable party, nor was it. The motion was granted because, as stated in the district court's opinion, "the suit relates to the internal affairs of a foreign corporation" and

[1] Rule 1 of the civil rules of the District Court for the Eastern District of New York allows one year from the filing of the complaint to make service. Cf. *Hackner v. Guaranty Trust Company*, 117 F. 2d 95 at 99 (C. C. A. 2).

"the convenience of witnesses and efficiency and justice demand that the courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case." Hence the question presented for decision by this appeal is whether the doctrine of *forum non conveniens* justified dismissal of the action.

The appellant relies upon the rule that where jurisdiction is conferred on a federal court its exercise of juris- [fol. 45] diction is mandatory, and only in exceptional cases of a steretyped character has the court discretion to decline it. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234; *Williams* v. *Green Bay & Western R. R. Co.*, — U. S. — (Jan. 7, 1946); *Griffith* v. *Bank of New York*, 147 F. 2d 899, 904 (C. C. A. 2). Controversies which involve interference with the internal affairs of a foreign corporation fall within one of the well recognized exceptions. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *Weiss* v. *Routh*, 149 F. 2d 193 (C. C. A. 2). But as Mr. Justice Douglas pointed out in the recent *Williams* case, *supra*, where only a money judgment is sought, the court will normally entertain jurisdiction, even though internal affairs are in some sense involved. In the case at bar, the insurance company is nominally a defendant but in essence is the plaintiff in an action which seeks an accounting for the waste and diversion of corporate assets by a faithless director and (in count two) by a corporation alleged to have participated in the fiduciary's wrongdoing. Inquiry into the conduct of the directors of the insurance company will be required but no such supervision into its internal affairs as to make the courts of Illinois a more appropriate forum than those of New York. Consequently, assuming for the moment that the plaintiff as a policy holder in a mutual company has the same right as would a shareholder in a stock company to bring a derivative action on the corporation's behalf, the district court should not decline jurisdiction on the ground that the action involves the internal affairs of a foreign corporation.[2]

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[2] While a federal court is not bound to follow state cases in respect to discretionary declination of jurisdiction—*Gilbert* v. *Gulf Oil Corporation* (C. C. A. 2, January 4, 1946)—it is interesting to note that the New York courts would not

[fol. 46] The parties are in dispute as to whether a policy holder has the same standing as a stockholder to bring a derivative action against a faithless fiduciary. The plaintiff asserts that the answer to this question depends upon the law of New York. We think not. Whether a person is a shareholder or other member of a corporation is determined by the law of the state of incorporation. *Gallup* v. *Caldwell*, 120 F. 2d 90, 93 (C. C. A. 3); A. L. I. Restatement of Conflict of Laws, § 182. And the rights of a policy holder in a mutual company to bring a derivative action are likewise governed by the terms of his contract under the law of the company's domicile. *Haynes* v. *Fraternal Aid Union*, 34 F. 2d 305 (D. C. Kans.). The law of Illinois on this point is not wholly clear. *People ex rel. Benefit Association of Railway Employees* v. *Miner*, 387 Ill. 393, *cert. den.*, — U. S. —, is relied upon by the appellee as indicating that a policy holder cannot bring a derivative action. That case was distinguished, however, in *Winger* v. *Chicago City Bank & Trust Co.*, 60 N. E. (2d) 560, 570 (Ill. App.) which sustained a derivative suit for the recovery of assets. In reason we see no valid distinction between a stockholder's and a policy holder's derivative suit seeking relief of this character. As we said in *Goldstein* v. *Groesbeck*, 142 F. 2d 422, 425, "A shareholder's suit in essence is nothing more than a suit by a beneficiary of a fiduciary to enforce a right running to the fiduciary as such." With respect to its cause of action against a faithless director, the company is a trustee for the policy holders who will benefit by its recovery of diverted assets. Even if there were more doubt than appears to us as to the plaintiffs' right under Illinois law to sue on behalf of the company, such doubt "is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it." *Williams* v. *Green Bay & Western R. R. Co.*, *supra*.

[fol. 47] Nor can non-exercise of federal jurisdiction be rested, in our opinion, on the theory that the court's action might interfere with the functioning of the state administrative agency which supervises insurance companies. For

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have declined jurisdiction had this been a derivative suit by a shareholder in a stock corporation. *Miller* v. *Quincy*, 179 N. Y. 294; *Ernst* v. *Rutherford B. S. G. Co.*, 38 App. Div. 388; *Goldstein* v. *Lightner*, 266 App. Div. 357, aff'd 292 N. Y. 670.

reasons stated in the *Winger* case, *supra*, the type of relief sought will not so interfere.

The issue really comes down to whether maintenance of the suit in New York will be so vexatious or oppressive that "considerations of convenience, efficiency and justice point to the courts of the state of domicile as appropriate tribunals for the determination of the particular case." See *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 131. On this issue the district court's opinion mentions as pertinent considerations the following facts derived from an affidavit by Lumbermens' secretary:

> "Lumbermens does business in every one of the 48 states. It employs approximately 2,144 persons, 750 of whom are employed in the Chicago offices, the home and principal place of business of Lumbermens since its organization. All of the general records relating to the business of Lumbermens are maintained in Chicago or warehouses located closely thereby. Lumbermens has seven directors, five of whom are residents of the State of Illinois having regular places of business in the City of Chicago. The other officers are residents of the State of Illinois. None of the records necessary for the trial of the issues of this action and none of the witnesses who apparently have any knowledge of the acts alleged in the complaint live outside the State of Illinois, and most of the witnesses and all of the records are in and about the City of Chicago.
>
> There will be involved in the trial of this action the transportation of large quantities of records from Chi- [fol. 48] cago to this District. There will also be involved the traveling expenses and subsistence of witnesses for examination before trial of directors, officers and employees of Lumbermens and the attendant loss of time of these witnesses when they come to ths District. If the defendant is successful, it would be most unjust to require the tremendous expense involved, and this is true should the plaintiff be successful.
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> . . . . . .
>
> Another item to be taken into consideration is the extreme emergency with respect to transportation and hotel accommodations which now exists and which will undoubtedly exist for some time to come."

The secretary's affidavit also states that the plaintiff became a policy holder in May 1941 and since that date has paid to Lumbermens total premiums of less than $250; and if plaintiff were entirely successful in his suit the net effect of the recovery by Lumbermens upon plaintiff's interest in the company would be an increase, negligible in amount, in the dividends applicable to his policy. None of the foregoing facts was controverted by the plaintiff. He relied solely on the legal proposition that the exercise of jurisdiction was mandatory. In that he is in error. The last paragraph of the opinion in the *Williams* case, *supra*, implicitly recognizes that jurisdiction may be declined if maintenance of the suit will be vexatious or oppressive, but holds that the facts there appearing do not lead to that conclusion, "whether the availability of witnesses or any other aspect of a trial be considered." The decision of this court in *Gilbert* v. *Gulf Oil Corporation*, handed down herewith, is to the same effect. Hence we think that the district court had discretion to decline jurisdiction, and on [fol. 49] the undisputed facts no abuse of discretion has been made to appear. See *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. On that ground the judgment is affirmed.

CLARK, Circuit Judge (dissenting):

Williams v. *Green Bay & Western R. Co.*, S. Ct., Jan. 7, 1946, reversed the exercise of discretion by the trial court, D. C. S. D. N. Y., 59 F. Supp. 98, affirmed by this court, 2 Cir., 147 F. 2d 777, to restrict the doctrine of *forum non conveniens* in narrow limits in cases claimed to involve interference with the internal affairs of a foreign corporation. While doing so, it clearly implied further disapproval of the reaches of *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, decided by a divided court and ever since the subject of critical comment. *Cf. Cohen* v. *American Window Glass Co.*, 2 Cir., 126 F. 2d 111; 113, 114; Frank, *J.*, dissenting in the *Williams* case, 2 Cir., 147 F. 2d 777, 781. The *Williams* case cannot therefore serve as authority for an extension of the doctrine admittedly going beyond that recognized even in the locale most hospitable to it, New York; indeed, quite the contrary.

As we pointed out in *Gilbert* v. *Gulf Oil Corp.*, 2 Cir., Feb. 4, 1946—another attempt to extend the doctrine even

beyond the New York precedents—it seems a serious thing for federal judges of their own initiative to introduce a limitation of the authorized diversity jurisdiction of the federal courts to that district only where most of the witnesses seem likely to be. It may well be a matter of interest to Congress, as in the proposed revision of the Judicial Code which now purports both to *extend* the venue of actions against foreign corporations and to grant a discretionary power of transfer "for the convenience of parties and [fol. 50] witnesses." *Gilbert* v. *Gulf Oil Corp., supra.* But it is another thing for a court to say to a plaintiff that even though Congress has specifically provided that you may sue a defendant duly served in your home district, 28 U. S. C. A. § 112, you may not do so if it will inconvenience your adversary. And even the legislative body may hesitate to change the existing statutes upon examining some of the grounds here relied on for a denial of jurisdiction: the small amount of the plaintiff's investment, the supposed lack of hotel accommodations in this metropolitan area, the fact that defendant, like most large corporations today, does business and can be sued in many federal districts, and that it is a large corporation at its home base. Such considerations might lead legislators to think that the usually assigned reason for this jurisdiction, the avoidance of local prejudice, has still a sphere of operation.

To date the operation of the doctrine of refusal of jurisdiction otherwise granted seems to have been limited in the federal courts to the case of supervision of a corporation, noted above, and the quite special admiralty doctrine of refusing adjudication of claims between "foreigners" (real foreign litigants, not merely citizens of another state). *The Belgenland,* 114 U. S. 355; *Charter Shipping Co.* v. *Bowring, Jones & Tidy,* 281 U. S. 515. And perhaps there is still open the question which troubled us in *Gilbert* v. *Gulf Oil Corp., supra,* namely, whether we should take over the special New York rule applied there in personal injury and death damage cases. This represents a great extension of the rule beyond anything I have been able to discover. If it is to be done at all, it should be in an unusually "vexatious or oppressive" case, as the terms were used in *Williams* v. *Green Bay & Western R. Co., supra.* — S. Ct. —, —. But [fol. 51] this case, like the *Gilbert* case, illustrates the quite natural, indeed human, tendency of the district court to accept vague generalities as an excuse for avoiding a perhaps

protracted litigation. Outside of the considerations mentioned above, which are surely immaterial, if not prejudicial to a fair examination of the point, the only ground seems to be the contention of the Casualty Company (the real beneficiary of the action, albeit the only moving party here) that it has many record books, as well as officers, located in Chicago. As I try to pierce these generalities, I find very little; indeed, it seems likely that the records can and should be summarized in written form and that the case may turn upon issues of law upon agreed or undisputed facts as to the employment of the company's president and of his separate company for unusual remuneration and commissions. Outside of his own testimony, which it probably lies in his power to limit to a deposition if he so chooses, F. R. 26(d), the amount of oral testimony and of disputed evidence of any sort seems limited. I question the power and policy involved in introducing into the law a limitation upon federal jurisdiction of this kind, and certainly of doing so upon the basis of such vague and general affidavits as these.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and forty-six.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

EUGENE KOSTER, Plaintiff-Appellant,

v.

AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant-Appellee; James S. Kemper and James S. Kemper & Co., Defendants

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and forty-six.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

EUGENE KOSTER, Plaintiff-Appellant,

v.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant-Appellee; James S. Kemper and James S. Kemper & Co., Defendants

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 53] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Eugene Koster v. (American) Lumbermens Mutual Casualty Company, James S. Kemper, etc. 86. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 4, 1946. A. M. Bell, Clerk.

[fol. 54-70] Petition for rehearing covering 13 pages filed Feb. 26, 1946 omitted from this print. It was denied, and nothing more by order of March 18, 1946.

[fol. 71] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE KOSTER, Appellant,

vs.

(American) LUMBERMENS MUTUAL CASUALTY COMPANY, Appellee,

and

JAMES S. KEMPER and JAMES S. KEMPER & CO., INC., Defendants

Before Swan, Chase and Clark, Circuit Judges

PETITION FOR REHEARING

Alfred Gurkin, Attorney for Appellant; Abraham L. Pomerantz and William E. Haudek, of Counsel

Per CURIAM:

Petition denied.

T. W. S., H. B. C., C. E. C., C. JJ.

Filed March 18, 1946.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of March, one thousand nine hundred and forty-six.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

EUGENE KOSTER, Plaintiff-Appellant,

v.

(American) LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant-Appellee; James S. Kemper and James S. Kemper & Co., Inc., Defendants

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk, by (S.) A. Daniel Fusaro, Deputy Clerk.

[fol. 73] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Eugene Koster v. American Lumbermens Mutual Casualty Company, et al. Order. United States Circuit Court of Appeals, Second Circuit. Filed March 18, 1946. Alexander M. Bell, Clerk.

[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 93, Gulf Oil Corporation vs. Gilbert.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 76] Endorsed on Cover: File No. 51070. U. S. Circuit Court of Appeals, Second Circuit. Term No. 206. Eugene Koster, Petitioner, vs. (American) Lumbermens Mutual Casualty Company. Petition for writ of certiorari and exhibit thereto. Filed June 17, 1946. Term No. 206 O. T. 1946.